UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2705/02-2707

State of Missouri, ex rel.,	*	
	*	
Appellant,	*	Order Denying Petition
	*	for Rehearing and for
v.	*	Rehearing En Banc
	*	
American Blast Fax, Inc.,	*	
et al.,	*	
	*	
Appellees.		

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Theodore McMillian and Judge Morris S. Arnold did not participate in the consideration or decision of this matter. (5128-010199)

July 3, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
Eighth Circuit.

Nos. 02-2705, 02-2707

State of Missouri, ex rel. Jeremiah W. (Jay) Nixon, Attorney General, Plaintiff-Appellant, United States of America, Intervenor/Plaintiff-Appellant, v. American Blast Fax, Inc., a Texas corporation not authorized to transact business in Missouri as a foreign corporation, Defendant-Appellee, Fax.com, Inc. Movant-Appellee.	*	Appeal from the United States District Court for the Eastern District of Missouri
State of California; State of Alaska; State of Arkansas; State of Connecticut; State of Colorado; District of Columbia; State of Florida; State of Idaho; State of Illinois; State of Iowa; State of Kentucky; State of Maryland; State of Michigan; State of Minnesota; State of New Mexico; State of Oregon, State of South Dakota; State of Texas; State of Vermont; State of West	*	

Virginia, *

*

Amici Curiae on behalf of Appellants, *

American Business Media; Wal-Mart Stores, Inc.; ACS Systems, Incorporated; Micro General Corporation, *

*

Amici Curiae on behalf of Appellees. *

Submitted: Jan. 13, 2003
Filed: March 21, 2003

Before WOLLMAN and MURPHY, Circuit Judges, and GRITZNER,[1] District Judge.

MURPHY, Circuit Judge.

In these two consolidated cases the State of Missouri sued American Blast Fax, Inc. and Fax.com, Inc. for violating statutory restrictions on unsolicited fax advertising. The district court held that the relevant part of the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227(b)(1)(C) (2000), violated the First Amendment guarantee of freedom of speech, and dismissed the action.[2] *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 196 F. Supp. 2d 920, 934 (E.D. Mo. 2002). Intervenor United States and

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[1] The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa, sitting by designation.

[2] The district court also dismissed other allegations in the complaints. Also dismissed were alleged statutory violations for omitting information required by TCPA sec. 3, § 227(d), 47 U.S.C. § 227(d), and for misrepresenting that advertisements complied with federal law in violation of the Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010. No issue has been raised on appeal about these dismissed claims. *See Halabi v. Ashcroft*, 316 F.3d 807, 808 (8th Cir. 2003) (objection waived if not briefed).

Missouri appeal (collectively "the Government"). We reverse.

I.

American Blast Fax[3] and Fax.com (FC) provide promotional services by transmitting client advertisements to the fax machines of potential customers. In response to numerous consumer complaints, Missouri sought injunctions and civil penalties against the two companies, alleging that they had violated the provision of TCPA making it unlawful "to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). An "unsolicited advertisement" is defined in the statute as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." *Id.* § 227(a)(4).

The fax companies moved to dismiss the complaints, arguing that § 227(b)(1)(C) was an unconstitutional restriction on their freedom of speech. The district court decided that the legislative record was insufficient to decide the constitutional questions and ordered an evidentiary hearing, converting the motions to ones for summary judgment. It also granted the motion of the United States to intervene.

At the hearing, the Government presented evidence that unsolicited fax advertising shifts costs to the recipients who are forced to contribute ink, paper, wear on their fax machines, as well as personnel time. There was also evidence to show that a fax advertisement interferes with the recipients' use of their machines by preempting the fax line for the time it takes to send a message. Witnesses testified on behalf of the attorneys general of Florida and Washington that their offices had been receiving increasing numbers of

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[3] American Blast Fax has not participated in this appeal and may no longer be in business. *See Missouri ex rel. Nixon v. American Blast Fax, Inc.*, 196 F. Supp. 2d 920, 922 n.3, 923 n.4 (E.D. Mo. 2002).

complaints about unsolicited fax advertisements. The defendant companies presented evidence that technological advances had reduced the amount of costs and interference experienced by recipients and that fax advertising benefits both advertisers and consumers.

The district court approached the constitutional questions by applying the four part test for restrictions on commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980). The court questioned whether the government had shown that there was a substantial governmental interest in restricting unsolicited fax advertising. It noted the absence of empirical data on costs or evidence that the majority of unsolicited fax advertisements involved commercial speech. It also observed that complaints about unsolicited faxes had increased despite the legislation and that several less restrictive options were available, such as a national no fax database, and it concluded that the Government had not demonstrated that the § 227(b)(1)(C) restriction would materially alleviate the asserted harm or that it was sufficiently narrow. After concluding that § 227(b)(1)(C) violated the First Amendment, the district court granted the pending motions and dismissed the action.

The United States and Missouri appeal. They argue that the statute is constitutional and that the district court erred in its application of the *Central Hudson* test. They contend that there was sufficient evidence to demonstrate a substantial government interest in restricting unsolicited fax advertisements and that TCPA materially advanced that interest and was not more extensive than necessary. They argue that technological changes have not eliminated the burdens imposed on recipients of unwanted fax advertising and that the district court was wrong to substitute its own judgment for the conclusion of Congress that the restriction was the minimum necessary to protect the public. They also point out that no other federal court has found this statute unconstitutional. *See Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 57 (9th Cir. 1995), *aff'g* 844 F. Supp. 632 (D. Or.

1994); *Texas v. Am. Blast Fax, Inc.*, 121 F. Supp. 2d 1085, 1092 (W.D. Tex. 2000); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1169 (S.D. Ind. 1997).

II.

The parties agree that the fax advertisements in question are commercial speech, and the Supreme Court has recently indicated that *Central Hudson* remains the test for the constitutionality of a restriction on commercial speech. *See Thompson v. W. States Med. Ctr.*, 122 S. Ct. 1497, 1504 (2002). Under *Central Hudson*

> we ask as a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, however, we next ask "whether the asserted governmental interest is substantial." If it is, then we "determine whether the regulation directly advances the governmental interest asserted," and, finally, "whether it is not more extensive than is necessary to serve that interest." Each of these latter three inquiries must be answered in the affirmative for the regulation to be found constitutional.

Id. (citations omitted) (quoting *Central Hudson*, 447 U.S. at 566). Since it is not argued here that the faxes were misleading or concerned unlawful activity, only the final three elements of the *Central Hudson* test are at issue. We review an order granting summary judgment de novo. *Donovan v. Harrah's Md. Heights Corp.*, 289 F.3d 527, 528 (8th Cir. 2002).

A.

FC argues that the Government has not shown a substantial governmental interest. It contends that the asserted interest, preventing unwanted fax advertising from shifting advertising costs to unwilling consumers and interfering with their fax machines, is insufficient to justify the statutory restriction. It contends that the Government has

not produced empirical data to support its assertion and that technological progress has reduced any harm to a de minimis level. *See Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (government "must demonstrate that the harms it recites are real").

We do not agree with FC that the Government must produce empirical studies to show the significance of the harm it seeks to remedy, for the Supreme Court has pointed out that it may demonstrate the substantiality of its interest with anecdotes, "history, consensus, and 'simple common sense.'" *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)); *cf. Van Bergen v. Minnesota*, 59 F.3d 1541, 1554 (8th Cir. 1995) ("external evidence" of harm unnecessary in case involving content neutral speech restriction). In this case, the legislative record and the evidence produced in the district court adequately demonstrate the potential harm of unrestrained fax advertising.

We first turn to the legislative history, which predates the passage of TCPA. A hearing on predecessor bills showed that Congress had become aware of a "junk fax" problem from media reports and legislative initiatives in many states. *Telemarketing Practices: Hearing on H.R. 628, H.R. 2131, and H.R. 2184 Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 101st Cong. 2-3 (1989) (statements of Chair Markey and Rep. Rinaldo, Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce). A Maryland official testified that even though his state had passed a measure to ban unsolicited commercial fax advertisements, federal legislation was required for a full solution to a problem likely "to grow in scale." *Id.* at 82-83 (statement of John M. Glynn, Maryland Office of People's Counsel). The subcommittee was also presented with research which indicated the pervasive nature of this type of advertising. It was reported that at least one fax advertiser could "routinely send[ ] 60,000 fax advertisements per week" and that "business owners are virtually unanimous in their view that

they do not want their fax lines tied up by advertisers trying to send messages." *Id.* at 54-56 (footnote omitted) (statement of Robert L. Ellis, Indiana University School of Law).

In hearings held in 1991, the co-founder of the Center for the Study of Commercialism described the "numerous nuisance faxes" he had received and complained that they "not only use the recipient's paper, but also prevent faxes from being sent out and prevent legitimate faxes from coming in." *Hearing on S. 1462, S. 1410, and S. 857 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Sci., and Transp.*, 102d Cong. 41 (1991) (statement of Michael Jacobson). A House subcommittee heard from the chair of the Florida Public Service Commission that "[t]he junk fax advertiser is a nuisance who wants to print [its] add [sic] on your paper ... [and] seizes your fax machine so that it is not available for calls you want or need." *Telemarketing/Privacy Issues: Hearing on H.R. 1304 and H.R. 1305 Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 102d Cong. 31 (1991) (statement of Thomas Beard). TCPA was subsequently enacted in that same year.

The hearing held in the district court in 2001 also produced evidence that the harms of unsolicited fax advertising are real and have not been eliminated by technological changes. There was evidence that unsolicited fax advertisements can shift to the recipient more than one hundred dollars per year in direct costs, that it takes thirty seconds for a one page fax to be received, that most machines can still only receive one fax at a time, that currently eighty percent of all faxes are printed on paper, and that unsolicited fax advertising interferes with company switchboard operations and burdens the computer networks of those recipients who route incoming faxes into their electronic mail systems. The record evidence from that hearing indicates that the costs and amount of interference resulting from unrestrained fax advertising continue to be significant. *See Destination Ventures*, 46 F.3d at 57

("[U]nsolicited fax advertisements shift significant advertising costs to consumers.").

We conclude that the Government has demonstrated a substantial interest in restricting unsolicited fax advertisements in order to prevent the cost shifting and interference such unwanted advertising places on the recipient.

B.

FC contends that there are several reasons why the TCPA restriction on commercial faxes cannot survive the third part of the *Central Hudson* test, which requires a showing that "'the regulation directly advances the governmental interest asserted.'" *W. States*, 122 S. Ct. at 1504 (quoting *Central Hudson*, 447 U.S. at 566); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) ("Government carries the burden of showing that the challenged regulation advances the Government's interest in a direct and material way." (internal quotation marks omitted)). This step helps ensure that there is "a reasonable fit between the legislature's ends and the means chosen to accomplish [them]." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) (internal quotations marks omitted).

1.

FC argues that if a restriction treats commercial and noncommercial speech differently, there must be a basis for the difference that is relevant to the asserted governmental interest. FC contends that this case is just like *City of Cincinnati v. Discovery Network, Inc.* where an ordinance was found unconstitutional because there was not a good fit between the asserted aesthetic interest and the ban on only commercial newsracks on the street. *See* 507 U.S. 410, 425, 428 (1993). FC argues that a noncommercial fax shifts costs and interferes with a recipient's fax machine just as much as a commercial fax.

This case is different from *Discovery Network*, however, because the distinction between commercial and

noncommercial faxes is relevant to the asserted governmental interest. In *Discovery Network* the only justification advanced by the city for singling out commercial newsracks was "the 'low value' of commercial speech," a position which the court refused to adopt. 507 U.S. at 428. When Congress enacted TCPA, however, it had found that "non-commercial calls ... are less intrusive to consumers because they are more expected." H.R. Rep. No. 102-317, at 16 (1991). There is no reason to doubt that Congress also believed for the same reason that noncommercial faxes did not present the same problem as commercial faxes and therefore distinguished between them. The Supreme Court has indicated that Congress may rely on various forms of evidence to distinguish between different types of speech. *See Florida Bar*, 515 U.S. at 628. For example, restrictions on speech may be justified "by reference to studies and anecdotes pertaining to different locales altogether ... [and] history, consensus, and 'simple common sense.'" *Id.* (quoting *Freeman*, 504 U.S. at 211). The legislative history here shows that TCPA's distinction between commercial and noncommercial fax advertising is relevant to the goal of reducing the costs and interference associated with *unwanted* faxes. We agree with the Ninth Circuit that this distinction is justified.[4] *Destination Ventures*, 46 F.3d at 56.

2.

FC also argues that the restriction on fax advertising cannot directly and materially advance the asserted governmental interest because gaps in the statute's coverage limit its effectiveness. Unsolicited live telemarketing calls,

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[4] *Discovery Network* also differs from this case in that commercial newsracks represented only a small percentage of the newsracks on Cincinnati streets, 507 U.S. at 418, while commercial faxes make up a large proportion of all unsolicited faxes, *see infra* p. 658. Moreover, the government may regulate one aspect of a problem without regulating all others, *see United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993) ("Government [is not required to] make progress on every front before it can make progress on any front.").

some types of unsolicited commercial faxes, and unsolicited noncommercial faxes are not restricted, and FC contends that TCPA thus resembles the statutes struck down in *Coors*, 514 U.S. at 488, and *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173, 190 (1999).

TCPA is quite different from the statutes at issue in *Coors* and *Greater New Orleans*. In *Coors*, the government claimed that legislation prohibiting the display of alcohol content on beer labels advanced the legislative interest in "curbing 'strength wars' by beer brewers who might seek to compete for customers on the basis of alcohol content." 514 U.S. at 483. The Supreme Court found "overall irrationality" in the statute since it did not apply to advertisements, and alcohol content in a product could be widely disclosed by other means; such advertising would appear to be "a more influential weapon in any strength war than labels." *Id.* at 488. Moreover, the statutory restriction did not apply to wine, spirits, or the "term 'malt liquor.'" *Id.* at 488-89. The asserted governmental interest in suppressing competition based on high alcohol content was therefore unlikely to be advanced. Likewise, in *Greater New Orleans* the Court was skeptical about the government's position that legislation banning advertisements for private casino gambling served the governmental interests of "reducing the social costs associated with 'gambling'" and helping states restrict it. 527 U.S. at 185. The Court found the government's position inconsistent with its "simultaneous" support for tribal casino gambling which could involve the same social costs. *Id.* at 189-91. Inconsistencies and discrepancies in these two pieces of legislation therefore showed that the statutes were not likely to advance their asserted purposes. *See id.* at 190; *Coors*, 514 U.S. at 489.

TCPA by contrast contains no inconsistency that renders it incapable of materially advancing the Government's asserted interest. While there is differential treatment in TCPA of unsolicited fax advertisements and live telemarketing calls, the difference is consistent with TCPA's goal to protect members of the public from bearing the costs of unwanted

advertising.[5] Thus, TCPA treats live telemarketing solicitations differently if they impose costs on the recipient. While they are generally permitted unless an individual has registered an objection to being contacted, *see* 47 U.S.C. § 227(c), 47 C.F.R. § 64.1200(e)(2)(iii) (2002), they are prohibited when they result in out of pocket costs for the recipient, *see* 47 U.S.C. § 227(b)(1)(A)(iii) (prohibiting calls made without consent "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call"). Because of the cost shifting of fax advertising, it was consistent for Congress to treat unsolicited fax advertisements differently than live telemarketing calls. The distinction in no way undercuts the TCPA goal of protecting the public from unwanted advertising costs.

FC also argues that the legislation was made unconstitutionally inconsistent by a statutory interpretation of the Federal Communications Commission (FCC). The FCC has interpreted TCPA not to prohibit the sending of unsolicited commercial faxes to a recipient with whom a sender has an established business relationship. *See* In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C.R. 8752, 8779 n.87 (Oct. 16, 1992). Even if one assumes that

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[5] The distinction made in TCPA between live telemarketing calls and faxes is also consistent with other concerns behind the statutory scheme. Because Congress found telemarketing solicitations made by a person to be less of a nuisance or of an invasion of privacy than artificial or prerecorded calls, *see* S. Rep. No. 102-178, at 4 & n.4, 5 & n.5 (1991), *reprinted in* 1991 U.S.C.C.A.N.1968, 1972-73, live solicitations are permitted unless an individual has registered an objection in advance, *see* 47 U.S.C. § 227(c), 47 C.F.R. § 64.1200(e)(2)(iii) (2002), while "artificial" calls are prohibited without the recipient's express consent, 47 U.S.C. § 227(b)(1)(B). Artificial or prerecorded messages, like a faxed advertisement, were believed to have heightened intrusiveness because they are unable to "interact with the customer except in preprogrammed ways." S. Rep. No. 102-178, at 4-5, *reprinted in* 1991 U.S.C.C.A.N. at 1972.

this FCC interpretation is entitled to deference and is part of the governing law, it does not undermine the governmental interest in reducing the cost shifting and interference caused by unwanted commercial faxes. It would not have been unreasonable for Congress to conclude that a preexisting business relationship is an indication that a fax advertisement would be welcome. Congress in fact made this distinction explicit with respect to telephone solicitations. *See* 47 U.S.C. § 227(a)(3). We cannot conclude that this exemption renders the statute so "pierced by exemptions and inconsistencies," *Greater New Orleans*, 527 U.S. at 190, or "overall irrational[ ]," *Coors*, 514 U.S. at 488, that it cannot materially and directly advance the governmental interest.[6]

Finally, FC urges that TCPA's prohibition of only unsolicited commercial faxes prevents the statute from advancing the asserted governmental interest. The legislative record indicates that commercial calls constitute the bulk of all telemarketing calls, see H.R. Rep. No. 102-317, at 16, and in the absence of contrary evidence we are persuaded that commercial faxes likely constitute a similar proportion of all unsolicited faxes, *cf. Florida Bar*, 515 U.S. at 628 (restrictions on speech may be justified "by reference to studies and anecdotes pertaining to different locales altogether ... [and] history, consensus, and 'simple common sense'" (quoting *Freeman*, 504 U.S. at 211)). By placing

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[6] FC argues in addition that TCPA does not prohibit unsolicited commercial faxes regarding job openings and "image" advertisements not explicitly offering a product for sale. These are not exceptions contained in the statute, however. One was put forward by a federal district judge, *see Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180, 181-82 (E.D. Pa.1994) (faxed advertising of job openings do not fall within the scope of TCPA), and the other has been asserted by FC itself. Not only are these "exceptions" not in the statute, but they would not undermine the Government's asserted purpose, unlike the statutory exceptions in *Coors*, 514 U.S. at 489, and *Greater New Orleans*, 527 U.S. at 190. In contrast, TCPA directly and materially advances Congress's goal by squarely addressing the category of commercial fax advertising that appears to make up a substantial portion of all such faxes, i.e., those "advertising the commercial availability or quality of any property, goods, or services," 47 U.S.C. § 227(a)(4).

restrictions on those responsible for a large portion of the problem, TCPA directly and materially advances the congressional goal of limiting the harm arising from unsolicited fax advertisements. Congress is not required to "make progress on every front before it can make progress on any front." *United States v. Edge Broad. Co.*, 509 U.S. 418, 432-34 (1993) (statute that effectively eliminated only small ratio of lottery advertisements still directly advanced a governmental interest of "discouraging public participation in lotteries"); *see also Destination Ventures*, 46 F.3d at 56 ("The First Amendment does not require Congress to forgo addressing the problem at all unless it completely eliminates cost shifting.").

We conclude that the TCPA's prohibition on unsolicited commercial fax advertisements directly and materially advances the asserted governmental interest and satisfies the third element of the *Central Hudson* test.

C.

The final question in the *Central Hudson* test is whether the restriction on speech is "'not more extensive than necessary to serve the interests that support it.'" *Lorillard*, 533 U.S. at 556 (quoting *Greater New Orleans*, 527 U.S. at 188). FC argues that there are several alternative solutions to the unsolicited fax problem which would be less restrictive and that this shows § 227(b)(1)(C) is too broadly drawn. FC contends in particular that Congress could have adopted an opt out mechanism that would require fax recipients to declare their desire not to receive unsolicited commercial faxes, rather than requiring fax advertisers to secure the consent of potential recipients.[7]

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[7] FC suggests, for example, that Congress could have implemented a scheme under which an advertiser is prohibited from sending a second fax to a person who has previously indicated that he does not wish to receive such faxes, similar to the manner in which live telemarketing is regulated under TCPA, *see* 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(e)(2). Another suggested alternative is a nationwide no fax list. FC also points out that several states have regulated unsolicited fax

We disagree that TCPA is unconstitutionally broad. The Supreme Court has made it clear that "the 'least restrictive means' test has no role in the commercial speech context." *Florida Bar*, 515 U.S. at 632. Instead, what is required

> "is a 'fit' between the legislature's ends and the means chosen to accomplish those ends," a ["]fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective."

Id. (second alteration in original) (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). Section 227(b)(1)(C) satisfies this standard. Advertisers remain free to publicize their products through any legal means; they simply cannot do so through an unsolicited fax. TCPA does not act as a total ban on fax advertising. Advertisers may obtain consent for their faxes through such means as telephone solicitation, direct mailing, and interaction with customers in their shops. *Cf. Van Bergen*, 59 F.3d at 1556 ("Live telephone calls ... and bulk mailings are all inexpensive and effective [means of communication]."). While it is true that the effect of TCPA will be that some consumers will not receive unsolicited advertisements they might have appreciated, under the approach advocated by FC there would always be individuals suffering costs and interference from unwanted advertisements. It was not unreasonable for Congress to choose a system that protects those who would otherwise be forced to bear unwanted burdens over those who wish to send and receive unsolicited fax advertising. Given the cost shifting and interference imposed by unsolicited commercial faxes and the many alternatives left available to advertisers, TCPA's approach is "'in proportion to the interest served ... [and is] narrowly

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advertising by imposing strict page and time-of-day limits. *See, e.g.*, N.Y. Gen. Bus. Law § 396-aa(1); N.D. Cent. Code § 51-07-23; Wis. Stat § 134.72.

tailored to achieve the desired objective.'" *Florida Bar*, 515 U.S. at 632 (internal quotation marks omitted) (quoting *Fox*, 492 U.S. at 480).

The cases in which the Supreme Court has recently struck down restrictions on commercial speech for being too broadly drawn, *see W. States*, 122 S. Ct. at 1506; *Lorillard*, 533 U.S. at 561; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (opinion of Stevens, J., joined by Kennedy, Souter, and Ginsburg, JJ.); *Coors*, 514 U.S. at 490-91, had different characteristics than we are faced with here. First, those cases dealt with concerns not at issue here. The legislation there banned dissemination of truthful commercial information, either to "prevent members of the public from making bad decisions with the information," *W. States*, 122 S. Ct. at 1507, or to advance a governmental interest that could be furthered "without regulating speech," *44 Liquormart*, 517 U.S. at 503 (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.). *See W. States*, 122 S. Ct. at 1500-01, 1505 (striking down federal restriction on advertisement and promotion of particular drugs where goal was to prevent large scale manufacturing); *Lorillard*, 533 U.S. at 533, 566-67, 569 (finding unconstitutional Massachusetts regulation of advertising to reduce underage tobacco use, but upholding restriction on manner of sale); *44 Liquormart*, 517 U.S. at 489-90 (striking effort to promote temperance by prohibiting advertisements of retail prices for alcoholic beverages); *Coors*, 514 U.S. at 483-84. In this case, the TCPA ban on unsolicited commercial fax advertisements is neither intended to protect the public from the content of the speech nor to implement policy unrelated to the delivery of the message itself. In prohibiting these fax advertisements, Congress was not concerned with the effect of the content of the advertisements, but rather with the effect of the act of communicating. This case is therefore more similar to *Florida Bar* where the Court upheld a ban on "targeted direct-mail solicitations [of] victims and their relatives [by attorneys] for 30 days following an accident or disaster." 515 U.S. at 620. The *Florida Bar* Court emphasized the fact that "the harm posited ... is as much a

function of simple receipt of targeted solicitations ... as it is a function of the letters' contents." *Id.* at 631. The harm associated with unsolicited fax advertisements is similarly not related to the content of the messages.

Second, the regulations at issue in three of the cases cited by FC were so broad as to "constitute nearly a complete ban on the communication of truthful information [about a commercial product]." *Lorillard*, 533 U.S. at 562; *see W. States*, 122 S. Ct. at 1502 (flat ban on all advertising of compounded drugs absent FDA approval of drug); *44 Liquormart*, 517 U.S. at 530-31 (opinion of O'Connor, J., joined by Rehnquist, C.J., Souter, J., and Breyer, J.) ("No channels exist at all to permit [liquor merchants] to publicize the price of their products."). Section 227(b)(1)(C) does no such thing, and advertisers remain free to publicize their products through many legal means other than an unsolicited fax. Moreover, TCPA has not eliminated the fax machine as an available channel of communication. If an advertiser wishes to promote its business by fax, there are many ways for it to secure the consent of willing potential customers, just as in *Florida Bar* where there were "many other ways for injured Floridians to learn about the availability of legal representation." 515 U.S. at 633; *see 44 Liquormart*, 517 U.S. at 502 (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.) ("[W]e upheld [the *Florida Bar* regulation] largely because it left so many channels of communication open to Florida lawyers.").

We conclude that the TCPA restriction on unsolicited commercial fax advertisements achieves a reasonable fit between the means it adopts and the ends it seeks to serve. It thus satisfies the fourth element of the *Central Hudson* test. *See Florida Bar*, 515 U.S. at 632.

III.

We conclude that 47 U.S.C. § 227(b)(1)(C) satisfies the constitutional test for regulation of commercial speech and thus withstands First Amendment scrutiny. There is a substantial governmental interest in protecting the public

from the cost shifting and interference caused by unwanted fax advertisements, and the means chosen by Congress to address these harms directly and materially advances the governmental interest. The statute is also narrowly tailored to create a reasonable fit with its objective. Accordingly, we reverse the judgment dismissing the claims asserted under § 227(b)(1)(C) and remand the case to the district court for further proceedings consistent with this opinion.

United States District Court,
E.D. Missouri,
Eastern Division.

State of Missouri, ex rel. Jeremiah W. (Jay) Nixon,
Attorney General,
Plaintiff,
v.
American Blast Fax, Inc., et al., Defendants.

No. 4:00CV933 SNL

March 13, 2002

MEMORANDUM OPINION

LIMBAUGH, Senior District Judge.

This matter is before the Court on defendant American Blast Fax, Inc.'s motion to dismiss (# 9) and defendant Fax.com Inc.'s motion to dismiss.[1] The underlying lawsuit alleges that defendants violated the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, by sending unsolicited facsimile advertisements.[2] Plaintiff also alleges that defendants violated the Missouri Merchandising Practices Act (MPA), Mo. Rev. Stat. § 407.010, by misrepresenting to Missouri consumers that the fax messages were sent in accordance with federal law. Defendants contend that § 227 of the TCPA violates the First

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[1] This motion was document # 16 in Case No. 4:00cv1265LOD. The cases were consolidated, but the parties were not required to re-file motions already pending in those cases. Therefore, the motion does not have a document number in the current cause of action, Case No. 4:00 cv933SNL.

[2] Throughout this opinion, the Court continuously refers to the TCPA. When it makes such a reference, it is only referring to the faxing prohibition in § 227, and not the entire statute.

Amendment right of freedom of speech. They also contend that the MPA claim is based primarily on the assumption that defendants' conduct violates the TCPA, and therefore, that claim must also fail. The United States, *eo nomine*, and on behalf of the Federal Communications Commission (FCC), has intervened in this cause of action, in order to defend the constitutionality of the TCPA.

Standard

Defendants filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). If, on a 12(b)(6) motion, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. The Court ordered a hearing in this cause of action and listened to testimony for two days. Because these were matters presented outside the pleadings, the motions to dismiss have been converted to those for summary judgment. Therefore, the standard for summary judgment is proper for these motions.

Courts have repeatedly recognized that summary judgment is a harsh remedy that should be granted only when the moving party has established his right to judgment with such clarity as not to give rise to controversy. *New England Mut. Life Ins. Co. v. Null*, 554 F.2d 896, 901 (8th Cir. 1977). However, summary judgment motions "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of material fact." *Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

Pursuant to Federal Rule of Civil Procedure 56(c), a district court may grant a motion for summary judgment if all the information before the court demonstrates that "there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law." *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962). The burden is on the moving party. *Mt. Pleasant*, 838 F.2d at

273. After the moving party discharges this burden, the nonmoving party must do more than show that there is some doubt as to the facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

In passing on a motion for summary judgment, the court must review the facts in a light most favorable to the party opposing the motion and give that party the benefit of any inferences that logically can be drawn from those facts. *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983). The court is required to resolve all conflicts of evidence in favor of the nonmoving party. *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207, 210 (8th Cir. 1976).

Background

Defendant, American Blast Fax, Inc., is a Texas corporation, in the business of providing fax advertising services in the state of Missouri.[3] Defendant, Fax.com Inc., is a Delaware corporation doing business out of California. It transmits advertisements from California to telephone facsimile machines in Missouri. The Missouri Attorney General brought the instant cause of action, alleging that defendants violate the TCPA by sending fax advertisements when they have not received the express invitation or permission of persons to whom copies of advertisements are faxed. Defendants filed motions to dismiss arguing that the specific provision of the TCPA regarding unsolicited fax advertisements is unconstitutional.

In an order dated April 3, 2001, the Court held that the *Central Hudson* test was the proper standard to be used in this cause of action to analyze the restrictions on commercial

[3] There has been some indication that American Blast Fax, Inc. is no longer in business, but there is nothing on the record to this effect.

speech. *See Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of NY*, 447 U.S. 557, 566 (1980). The Court also held that the Government bears the burden of justifying the restrictions on commercial speech which the TCPA imposes. *See Edenfield v. Fane*, 507 U.S. 761 (1993). Finally, the Court noted that there was no evidence before the Court satisfying this burden, but that the Court would offer the government an opportunity to meet its burden by conducting a hearing. Soon after the April 3, 2001 order, the Court notified the United States that there was going to be a hearing regarding the constitutionality of 42 U.S.C. § 227(b)(1)(C). On May 8, 2001, the Court granted the United States motion to intervene, *eo nomine*, and on behalf of the Federal Communications Commission (FCC).

A hearing was held on July 9 and 10, 2001, and counsel for Fax.com, the State of Missouri, and the United States, were all present.[4] There were two motions in limine pending at the time of the hearing which the Court indicated it would take with the case. Both motions were filed by Fax.com, the first of which requested that the Court exclude such evidence of whether unsolicited faxes are annoying or offensive. The Court at this time is going to deny this motion in limine. The Court agrees with Fax.com's recitation of the law regarding this issue; however, the Court finds that the reasons for prohibiting the sending of unsolicited faxes are relevant to its inquiry, even if those reasons are not valid under the law. The second motion requested that the Court exclude all evidence regarding Fax.com's business practices. The Court will also deny this motion. This request is considerably broad, and although, not all of Fax.com's business practices

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[4] Counsel for American Blast Fax, Incorporated withdrew March 7, 2001, and since then, no attorney has entered an appearance for American Blast Fax. After counsel's withdrawal, the Court began to send its orders directly to American Blast Fax, but all of the mail was returned. The other parties in the lawsuit have indicated that they have been unable to reach Blast Fax, and their correspondence has also been returned. At the beginning of the hearing, the Court asked if there was anyone in the courtroom who wished to appear either as counsel or as a representative of American Blast Fax, and nobody responded.

may be relevant, some of them could be, and for that reason the Court is denying the motion.

There were many objections to exhibits during the hearing, which the Court took with the case. After careful consideration of all objections to exhibits, all said objections are hereby overruled with one exception. Exhibit 2 was an apparent printout of Fax.com's web page. The State argues that it can avoid the hearsay problems associated with web sites because it is an admission by a party opponent. However, the real problem in the document was that it was missing portions of the wording on the right margin. In other words, it was an incomplete copy of the actual web page. As was demonstrated at the hearing, portions of sentences were cut off, and nobody, including the witness who had identified the document, knew what words were missing on many of the pages. Because Exhibit 2 was not a complete and accurate representation of the website, the Court will sustain Fax.com's objection to Exhibit 2. All other exhibits offered into evidence during the hearing and accepted subject to objections are now received into evidence. If the Court does not refer to some of these exhibits, it is only because the Court found them to be unpersuasive.

The State of Missouri presented five witnesses during the hearing. The first, Greg Houser, works at Pitney Bowes and sells fax machines. He also does cost analysis for his customers and he gave some testimony as to the cost of supplies in receiving faxes. He estimated that it would cost someone between 6 1/2 and 17 cents to receive a faxed advertisement depending on the type of facsimile machine.[5] However, he based these figures on retail prices, and as he admitted on cross, very few people actually pay retail prices.

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[5] These numbers were based on a variety of estimates. He estimated that one advertisement used four times as much toner as a "Slerexe" letter, and therefore, he multiplied the cost of toner for a "Slerexe" letter by four. Even the witness stressed in his testimony "it would be my estimate and it's--it is just that, an estimate, at probably somewhere around ..." and went on to give his calculation.

Large companies negotiate for much less, and small companies or those working out of the home, go to places such as Office Depot where sales are often run.

The second witness to testify for the State was Don Little, an investigator with the Missouri Attorney General's office. He identified 229 allegedly unsolicited[6] faxes which the Missouri Attorney General's office received from July 25, 2000 to June 5, 2001. These faxes were sent to five or more fax machines in the Attorney General's St. Louis offices throughout those ten and a half months. There was some question as to whether all of these faxes were advertisements as defined by the TCPA. There were some polls which did not advertise anything. There were faxes that stated "Get Paid To Enjoy Yourself" "Get Paid to Diet." These do not appear on the face to be advertising the commercial availability of property, goods, or services. There are others that were questionable, but the Court is not going to make a determination of whether they fall within the definition provided by the statute.[7]

Dan Drissell, a State Farm insurance agent, also testified for the State. He runs a small office with only three other employees, and he described the problems associated with his business in receiving unsolicited fax advertisements. He testified that the faxes tie up his phone lines for phone calls and other faxes, and that the faxes cost him money for tangible items such as paper and ink cartridges, as well as the time his staff has to spend retrieving these faxes from the fax machine. However, Mr. Drissell did not even estimate how

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[6] The witness testified that to his knowledge no one in the Attorney General's office requested these faxes, but he did not ask the people who worked in the area of the facsimile machines if they requested any of these faxes. One fax specifically stated in its transmittal line that it was "To Attorney General."

[7] Defendants argue that § 227 is void for vagueness. Although defendants arguments appear to have some merit, the Court will not address this issue. The hearing was only in regards to the *Central Hudson* standard, and the United States was not given an opportunity to address this issue.

much these unsolicited faxes cost his business per month or even per year. He also did not testify that he had received complaints from his customers of how they could not reach him by phone or fax because the lines were busy, nor did he give an example of a job he was unable to successfully complete because of the sending of an unsolicited fax. Mr. Drissell indicated that three years ago he was receiving five to ten faxes a day, but now he receives only one a day.[8]

The Court then heard testimony from Ian McLauchlan and Scott Nelson. Mr. McLauchlan owns J2 Global Communications and Mr. Nelson is employed there. J2 Global Communications offers a service where people can retrieve their faxes from their email accounts. J2 Global has approximately three million customers in the United States, four million customers worldwide. In providing fax delivery services to its customers, J2 utilizes fax servers connected to T-1 phone lines containing 24 voice channels. J2 assigns between 2,000 and 100,000 telephone facsimile numbers to one 24-channel T-1 line. When a "blast fax" occurs, the same fax is being sent to multiple fax numbers which are in sequential numbers and which come across the same T-1 line. This in turn "clogs" all 24 channels, and other people trying to send a fax would get a busy signal. Mr. McLauchlan also blamed "blast faxing" for some of their servers crashing. Mr. McLauchlan indicated that the number of telephone facsimile numbers assigned to each T-1 line depends on the grade of service which the customer signs up and pays for. For instance, the customer pays for a higher grade of service to be on a T-1 line with only 2,000 numbers. In addition, some customers do not pay anything for J2's

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[8] There is no indication what type of faxes Mr. Drissel was referring to when he said he was receiving a certain number of faxes. Counsel for the State asked "... how many faxes per day on average would you receive?" The Court can infer that the faxes were unsolicited by a couple answers later when Mr. Drissel stated that he tried "to get them stopped." However, there is no explanation if all of these faxes were advertisements or would even remotely be covered under the TCPA. *See* Tr. Transcript Vol. I, at 110.

service and these people are assigned to the lines with 100,000 numbers.[9] Mr. McLauchlan indicated that the company when making its plans for the future in replacing and upgrading its equipment, is not provisioning its servers to handle any unsolicited faxes even though he is aware that these faxes are going through the company's system.

The United States presented three witnesses. The first, was Penney Olson- Cannon, a switchboard operator at Safeco Insurance Company. Ms. Cannon testified that the sending of unsolicited faxes interrupts the business of Safeco because the faxes are sent to numbers that are not fax numbers. The fax then defaults to the switchboard, tying up the lines, and making customers wait while the operators answer these fax calls. Ms. Cannon testified that she always forwarded the fax to the company's fax machine because she believed that if she hung up, the fax would call her back.[10]

The other two witnesses called by the United States were Robert Buchner, who worked at the Florida Attorney General's office, and Mary Beth Haggerty-Shaw, who was employed at the Washington State Attorney General's Office.[11] Both witnesses said that there has been an increase in the number of complaints they have received regarding unsolicited faxes.[12] Mr. Buchner did not go into detail about

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[9] Testimony was later given by Mr. Kauffman which stated that 95% of J2's four million customers were not paying for their service suggesting that most of its customers are on the heavily populated T-1 lines. J2 makes its money from phone companies, advertisers, and from people who pay them for their customers's e-mail addresses.

[10] There was testimony that the fax machine would not have called back to the same number, but rather would have recognized that the phone number was not a fax number and would have stopped calling.

[11] Both Florida and Washington have state laws prohibiting unsolicited faxes, and so much of their testimony concerned complaints and violations of those state laws. The state laws have some overlap with the TCPA, however.

[12] Mr. Buchner indicated that over the last seven years, complaints concerning unsolicited fax advertisements increased. Ms. Shaw indicated that there had been an increase "over the past few years."

the complaints he received, or the faxes attached to the complaints. Ms. Shaw identified three faxing companies and the complaints her office received regarding these fax companies.

Ms. Shaw testified that her office received almost 100 complaints regarding 21st Century Fax. The Court reviewed these complaints, and most of the people complained about the "scams" implicated in the subject matter of the faxes. The Court reviewed the faxes attached to the complaints and found that the majority of them were polls and were not advertising anything. The other faxes stated the following: "Get Paid to Enjoy Yourself" and "Get Paid to Diet." The "scams" were suspected by the public because there was always a charge for the phone call or fax to either cast your vote or to inquire about the diet. In fact, one complaint came from a woman who wanted the faxing company to pay for her phone bill and charges for the phone call regarding the diet. The Court does not consider these faxes covered under the TCPA because they are not advertising the commercial availability of property, goods, or services. In addition, the complaints were not similar to the government's stated concerns regarding fax advertising. These people (with perhaps a few exceptions) were not complaining about these faxes costing them money and time, but rather that these faxes were scamming the public.

Ms. Shaw also testified that her office received 70 complaints regarding Fax.com, and 40-50 complaints regarding American Blast Fax. The time period for these complaints varies. Ms. Shaw testified that complaints against 21st Century covered a span of about a year. The 70 complaints regarding Fax.com began in January 1999 through April or May 2000, and the 40-50 complaints against American Blast Fax were concentrated to April and May 2000.

Defendants presented four witnesses, but the Court will not go into detail on three of them.[13] The Court would like to address the testimony of defendant's witness, Maury Kauffman.[14] Mr. Kauffman testified about future trends in the faxing industry, however, the Court would like to note, that it must rely on the facts as they exist now, rather than rely on speculation of where the faxing industry is headed. Mr. Kauffman did estimate that at the present time it costs about 2 to 3 cents to receive a normal fax. He stated that Pitney Bowes sells higher end toner, and that the numbers supplied by Mr. Houser were dealer list prices and that almost nobody buys toner at list price. Mr. Kauffman also testified that the cost of a telemarketing call to a business is greater than the cost of receiving a fax.[15] He testified that he has compared "fax to telemarketing to direct mail to magazine advertising to other types of marketing." He has determined in analyzing costs to businesses that the "receipt of a telemarketing call is higher by a magnitude" than the receipt of a fax.

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[13] Defendants do not bear the burden, and therefore, their witnesses' testimony was not as critical.

[14] Plaintiff and intervenor objected to this witness's testimony because he was tendered as an expert and they were not provided a resume and report pursuant to Federal Rule of Civil Procedure 26(a)(2). However, this was not a trial, but rather only a hearing, and under the unusual circumstances of the case, the Court held that the witness could still testify. Interestingly, the State's first witness, Mr. Houser, discussed industry standards, and gave opinions on how long it takes a fax to transmit and the cost of sending such a fax. In addition, Mr. Kauffman's testimony rebutted Mr. Houser's and Mr. McLauchlan's testimony. Finally, as the Court noted at the hearing after the witness had finished testifying, the majority of his testimony was based upon statistics and information that was available on the market. For these reasons, the Court held that the parties would not be unfairly prejudiced by Mr. Kauffman's testimony.

[15] Not only is Mr. Kauffman an expert on faxes and facsimile machines, he also happens to be involved in the Direct Marketing Association and has quite a bit of experience in the direct marketing area. He has written in many publications, as well as spoken at various marketing conferences.

Mr. Kauffman also ironically, was a consultant for J2 Global Communications for a period of time, and presently remains a stockholder in the company. He testified that many of J2's own problems regarding the "clogging" of all 24 channels, and the servers crashing, would be ameliorated if they were to "beef up" their system. In addition, Mr. Kauffman testified that J2 is in direct competition with defendants, because J2 also offers fax broadcasting. He testified that they actually have a sales force that is selling fax broadcasting, and that you can sign up for fax broadcasting on J2's website. Finally, Mr. Kauffman testified to all the advantages of fax advertising for both the businesses advertising and the consumers receiving the faxes.

Discussion

The TCPA makes it unlawful for any person "to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). The term "unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." § 227(a)(4). The TCPA was enacted in late 1991 and is part of the Communications Act of 1934. 47 U.S.C. § 151 *et seq.* The provision prohibiting unsolicited faxes was enacted as part of a larger amendment which included restrictions on telephone solicitations and automatic dialing systems. Defendants contend that the provision prohibiting unsolicited faxes violates their freedom of speech as protected by the First Amendment.

I. Standard of Scrutiny

The government has no power to restrict expression because of its message, its ideas, its subject matter, or its content, and with respect to noncommercial speech, the Supreme Court has sustained content-based restrictions only in the most extraordinary circumstances. *Bolger v. Youngs*

Drug Prod. Corp., 463 U.S. 60, 65 (1983). However, content-based restrictions on commercial speech may be permissible. *Id.* The speech at issue in this cause of action is commercial,[16] and therefore, the Court must apply the standard which is applicable to commercial speech.

The Court previously held that the *Central Hudson* test was the proper standard to be used in this cause of action to analyze the restrictions on commercial speech. 447 U.S. at 566. This test has been referred to as an "intermediate" level of scrutiny. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995).

The *Central Hudson* test is as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of NY, 447 U.S. 557, 566 (1980). The Government bears the burden of identifying a substantial interest and justifying the challenged restriction. *New Orleans Broad.*, 527 U.S. at 183. It is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). With this standard in mind, the Court will now turn to the circumstances of this particular cause of action.

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[16] Commercial speech is defined as "speech which does no more than propose a commercial transaction." *Bolger*, 463 U.S. at 66. Advertisements by definition qualify as commercial speech.

II. Application of the *Central Hudson* Standard

The four parts of the *Central Hudson* test are not entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three. *New Orleans Broad.*, 527 U.S. at 183-84. It is undisputed that the expression at issue in this cause of action is afforded a level of protection under the First Amendment. Defendants' fax advertisements concern lawful activity and are not misleading.[17]

Because fax advertisements are protected under the First Amendment, the Court must first determine if the government has a substantial interest in prohibiting unsolicited fax advertisements. A governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real. This burden cannot be satisfied by mere speculation or conjecture. *Edenfield*, 507 U.S. at 770-71. The Government has the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem. *Id.* at 776.

Congress identified in the legislative history, and it is argued by both the Missouri Attorney General and the United States, that the government has two interests in

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[17] The statute makes no distinction between those faxes which are misleading, and those which are not. The faxes on record that were sent by 21st Century Fax, and testified to by Ms. Shaw, might be misleading, in which case, those faxes would not be protected and the government would have unlimited authority to prohibit such faxes. There have been no allegations that the *advertisements* sent by American Blast Fax and Fax.com are misleading or concern unlawful activity. The State of Missouri originally alleged that they were misleading because it argued that the faxes lead consumers to believe that it is their responsibility to prevent unsolicited fax advertising by offering a number which consumers can call to be removed from defendants' database. However, the advertisements themselves are the commercial speech which the Court is analyzing, and as stated above, there are no allegations that the actual advertisements are misleading.

seeking to ban unsolicited fax advertisements. The first is that unsolicited junk faxing shifts advertising costs from the advertiser to the recipient. The second asserted interest is that unsolicited fax advertising occupies a recipient's facsimile machine so that the recipient cannot utilize it for his or her desired business purposes.

The Court has reviewed both the House and Senate Reports and found very little discussion on the specific provision banning unsolicited fax advertisements. S.Rep. No. 102-178 (1991), *reprinted* in 1991 U.S.C.C.A.N.1968; H.R.Rep. No. 102-317 (1991). The majority of the reports discuss telephone solicitation and automatic dialing systems. The Court also reviewed the hearing before the subcommittee on Telecommunications and Finance with similar results. *Telemarketing/Privacy Issues: Hearing Before the Subcommittee on Telecommunications and Finance of the Committee on Energy* and *Commerce House of Representatives*, 102nd Cong. (1991).

In reviewing the legislative history, Congress does express concern with the unfair shifting of advertisement costs from the advertiser to the consumer. The Senate Report states that "unsolicited calls placed to fax machines ... often impose a cost on the called party (fax messages require the called party to pay for the paper used ...)[18]." S. Rep. No. 102-178 (1991). This is the only mention of cost-shifting in its report. The House Report contained the following:

> The Committee found that when an advertiser sends marketing material to a potential customer through regular mail, the recipient pays nothing to receive the letter. In the case of fax advertisements, however, the recipient assumes both the cost associated with the use of the facsimile machine and, the cost of the expensive paper used to print out facsimile messages. It is important to note that these costs are borne by the recipient of the fax

[18] The witnesses at the hearing appeared to agree that the cost of one sheet of paper is now half a cent.

advertisement regardless of their interest in the product or service being advertised.

H.R. Rep. 102-317.

There was also very little in the House and Senate Reports regarding the second asserted interest: that unsolicited fax advertising occupies a recipient's facsimile machine so that the recipient cannot utilize it for his or her desired business purposes. The Senate Report refers to unsolicited fax messages as "detrimental to the owner's uses of his or her fax machine," but does not explain how or why it is detrimental. *See* S.Rep. No. 102-178 (1991). The House Report contains more: "when a facsimile machine is receiving a fax, it may require several minutes or more to process and print the advertisement. During that time, the fax machine is unable to process actual business communications. Only the most sophisticated and expensive facsimile machines can process and print more than one message at a time."[19] H.R. Rep. 102-317. The Report went on to state that "businesses have begun to express concern about the interference, interruption and expense that junk fax have placed upon them." *Id.* However, it does not state how many businesses had complained, or to whom they had complained.

It is obvious from the legislative history that Congress did not consider any studies or empirical data estimating the cost of receiving a fax or the number of unsolicited fax advertisements an average business receives in a day before enacting the TCPA. Witnesses at the hearing estimated the cost of receiving one fax, and other witnesses estimated how many faxes their particular business receives on an average. However, there was no evidence as to the actual cost to a

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[19] The evidence presented at the hearing showed that it no longer takes several minutes to process a single page fax. The evidence indicated that it could take as much time as 30 seconds, but more often it takes 3 to 6 seconds to process. The "sophisticated and expensive" facsimile machines are more common now as compared to 1991, and even a lower end fax machine can hold in its memory 60 to 80 pages.

particular business over a month or a year. There were only many long hypothetical examples of how much it *could* cost a business. Mr. Drissel did not testify that these faxes were costing his business a certain amount of dollars. The Court was not told how much *he* pays for toner and paper or how fast *his* facsimile machine is, or how much memory *his* machine has.

Defendants argue that the cost is *de minimus*, and is even less than it was at the time the statute was enacted in 1991. Defendants argue that expensive paper is no longer needed, as faxes are printed on regular paper, and in some cases, paper has been eliminated all together when faxes are converted into e-mails.[20] The Court does not need to decide if defendant's assertions are correct because the government has the burden to prove that it has a substantial interest. It must prove that the harm it is trying to prevent is real and that a serious problem does in fact exist. *See Edenfield*, 507 U.S. at 770-71, 776.

Plaintiff claims that "hard evidence" on costs or numbers of unsolicited advertisements is not required. The Supreme Court has stated that "we do not ... require that empirical data come to us accompanied by a surfeit of background information ... we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even ... to justify restrictions based solely on history, consensus, and 'simple common sense'." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995). However, in *Went For It* the plaintiff did submit a 106-page summary of its 2-year study, which included "data both statistical and anecdotal supporting the Bar's contentions." *Id.* at 626. The above quote was simply written in response to Justice Kennedy's dissent which

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[20] J2 Global does this for apparently three million people in the United States. There was some testimony that more companies like J2 will begin to emerge soon, and the majority of people will switch to this type of faxing. However, at the present time, most people use the standard facsimile machine and the faxes are printed out on paper.

complained that there were no copies of the actual surveys employed. *Id.* at 628. In the present case, there are not even *references* to studies that support that there is a "serious problem" which the government must address.[21] *See Edenfield*, 507 U.S. at 776.

Plaintiff also asserts that other courts addressing the provision banning unsolicited fax advertisements have found the government's interest substantial. The case law regarding the TCPA's provision banning unsolicited fax advertisements is limited. In 1994, the Oregon District Court noted the "absence of statistical data or national surveys addressing this interest," but nonetheless held that "Congress legitimately relied upon the testimony from authorities,[22] as well as contemporaneous state laws and media reports." *Destination Ventures, Ltd. v. Federal Communications Comm'n*, 844 F. Supp. 632, 637 (D. Or. 1994). It stated that "[d]espite the lack of detailed studies, there were repeated,

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[21] The only empirical studies referred to in the legislative history were in connection with telemarketing phone calls. There were no studies regarding unsolicited fax advertisements.

[22] This testimony included three witness who simply stated that junk faxes are a "nuisance." The statement by Thomas Beard, on behalf of National Association of Regulatory Utility Commissioners (NARUC), included the most extensive comment on junk faxes.

> The junk fax problem is a more recent situation and I do not believe many States have passed legislation on this issue. The junk fax advertiser is a nuisance who wants to print their ad[ ] on your paper. That call also seizes your fax machine so that it is not available for calls you want or need. The NARUC recently ran into this problem and I have attached *the ad* to this statement. As fax machines have become faster and easier to use, use of this form of communication has shown tremendous growth. Although I have seen no figures on national usage, I am judging by my own increasing reliance on the fax.
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> Hearing Before House Subcommittee on Telecommunications and Finance, 102nd Cong. 31 (1991) (emphasis added). Ironically enough, the NARUC included a resolution supporting the Act which prohibited the use of facsimile machines to send "unsolicited advertisements to persons who *specifically object*." *Id.* at 74, App. D (emphasis added). The TCPA goes farther than that and requires that the advertiser get express permission. 47 U.S.C. § 227(a)(4).

uncontradicted references made before Congress describing how facsimile advertising shifts economic burdens from the advertiser to the consumer." *Id.* The Ninth Circuit affirmed the Oregon District Court's decision but did not address the question of whether the government has a substantial interest in cost-shifting. *Destination Ventures, Ltd. v. Federal Communications Comm'n*, 46 F.3d 54, 55 (9th Cir. 1995) (the parties did not contest the government's substantial interest).

The Western District of Texas recently looked at the constitutionality of prohibiting unsolicited fax advertisements. *Texas v. American Blastfax, Inc.*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000). The court simply quoted the holding of the district court in *Destination Ventures*, and held that "Blastfax's argument that Congress' hearings were not based on sufficient statistical evidence is unpersuasive." *Id.* at 1092. The only other district court which has looked at the constitutionality of this issue, did not address whether or not the government's interest was substantial. *See Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1167 (S.D. Ind. 1997) (parties did not contest the government's substantial interest).

The Court does not find these district court cases persuasive. The Oregon court found that there were "repeated, uncontroverted *references* made before Congress." *Destination Ventures*, 844 F. Supp. at 637. However, the Court fails to see how these "references" satisfy the government's burden in showing a "serious problem." The legislative history is full of studies and statistics related to unsolicited phone calls, however, the reports are glaringly void of any statistical data in reference to unsolicited fax advertisements. H.R.Rep. No. 102-317 (1991) (looking at two telephone company studies, the increase in unlisted numbers, and looking at specifics in state law legislation regulating telemarketers).

The Court was presented with additional evidence of the government's interest in the form of witnesses and exhibits

at the hearing. The Court finds that there is a *potential* for a serious problem to arise without legislative restrictions on unsolicited faxes. However, the Court questions whether the government has met its burden in showing that there was a substantial interest at the time of enacting the TCPA, and whether there is a substantial interest at the present time.

Even if the government could meet its burden of showing a substantial interest, it cannot satisfy the other parts of the *Central Hudson* test. The Court must also look at whether the regulation directly advances the governmental interest asserted. *Central Hudson*, 447 U.S. at 566. The government must demonstrate that its restrictions will in fact alleviate the harm to a material degree. *Edenfield*, 507 U.S. at 771. In *Rubin v. Coors Brewing Co.*, the Supreme Court held that a law prohibiting the disclosure of alcohol content on beer labels did not directly advance the government's stated interest in preventing "strength wars." 514 U.S. 476 (1995). It pointed out that the law banned disclosure on beer labels but allowed it for wine and other spirits. It went on to state that "if combating strength wars were the goal, we would assume that Congress would regulate disclosure of alcohol content for the strongest beverages as well as for the weakest ones." *Id.* at 488.

The TCPA does not ban all unsolicited faxes, but rather only advertisements. Therefore, recipients can still bear the costs of printing others' messages, even if they strongly oppose the messages' content. The costs of printing political messages, jokes, and even some advertisements which are not included within the TCPA's definition, still fall upon the recipient. For instance, it has been held that an advertisement for job opportunities does not fall within the TCPA's definition, and therefore, is not prohibited by the statute. *See Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180 (E.D. Pa. 1994). Yet, these messages can still occupy a recipient's fax machine so that the recipient cannot use it for business purposes.

As the Supreme Court has noted, all four parts of the *Central Hudson* test are interrelated. *New Orleans Broad.*, 527 U.S. at 183-84. There is no evidence as to the number of unsolicited faxes the average business receives, and there is no breakdown as to how many of those are advertisements which fall within the TCPA's definition. The evidence at the hearing is a perfect example. Ms. Shaw had more complaints against 21st Century than she did of any other company, but those faxes were not advertising the commercial availability of property, goods or services.[23] In addition, Mr. Little had collected unsolicited faxes sent to the Missouri Attorney General's St. Louis offices, but some of those also failed to fall within the TCPA's definition. There is no evidence as to what type of unsolicited faxes are causing the harm which the government is trying to alleviate, so the Court cannot assess whether the regulation directly advances the government's interest. In addition, both the Washington and Florida Attorney General's offices testified that there was an *increase* in complaints regarding unsolicited faxes. The Court questions whether the TCPA actually advances the government's interest. If it did, the Court would assume that the complaints would decrease rather than increase.

The government also fails to satisfy the last prong of the *Central Hudson* test. The regulation cannot be more extensive than necessary. 447 U.S. at 566. The law requires there to be a "fit" between the legislature's ends and the means chosen to accomplish those ends a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served. *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480. The regulation cannot burden substantially more speech than is necessary to

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[23] Ms. Shaw testified that her office had received 100 complaints regarding 21st Century, as compared to 70 regarding Fax.com and 40-50 regarding American Blast Fax. The faxes sent from 21st Century consisted of polls and "Get Paid to Enjoy Yourself" "Get Paid to Diet" faxes.

further the government's legitimate interest. *Id.* at 478. The existence of numerous and obvious less-burdensome alternatives to the restriction on commercial speech is a relevant consideration in determining whether the "fit" between ends and means is reasonable. *Florida Bar*, 515 U.S. at 632. The availability of other options which can advance the government's asserted interest in a manner less intrusive to First Amendment rights, indicates that the regulation is more extensive than necessary. *Rubin*, 514 U.S. at 491.

Defendants offer a variety of alternatives, including a national "no- fax" database similar to those being utilized for telephone solicitations. In fact, the legislative history reveals that the House introduced legislation that would bar unsolicited fax transmissions to "any number which is on record as objecting to the receipt." *Telemarketing/Privacy Issues: Hearing Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce House of Representatives*, 102nd Cong. 4 (1991).[24] This alternative would promote the government's interest, and yet be less intrusive to First Amendment rights. Many states have looked at this problem and found less restrictive means than a complete ban on unsolicited fax advertisements.[25]

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[24] Before passing the TCPA in 1991, Congress considered several bills containing limited restrictions on sending unsolicited faxes. These restrictions were more narrowly drawn than what the TCPA presently dictates. It is unclear how or why Congress adopted the more stringent language.

[25] *See* CA Bus. & Prof. § 17538.4 (unsolicited fax advertisements must contain a toll-free number in 9 pt. type which recipient may call to indicate a desire not to receive such faxes); Tenn Code Ann. § 47-18-2501(a) (same); *Minn. Stat.* § 325E.395(a)-*(b)* (same, but also must include address where recipient can write); *Colo. Rev. Stat.* § 6-1-702(b)(I),(II) (must include a toll-free number); N.Y. Gen. Bus. § 396-aa(1) (unsolicited fax may be no longer than 5 pages and must be received between 9p.m. and 6a.m.); N.D. *Cent. Code* § 51-07-23 (same time restriction and may be no longer than 2 pages); *Or. Rev. Stat.* § 646.872(1) (faxes permitted unless recipient has sent notice that he or she does not wish to receive the faxes); R.I. Gen. Laws § 6-47-1(a)

In *City of Cincinnati v. Discovery Network, Inc.*, Cincinnati wanted to eliminate some newsracks due to safety and aesthetics. 507 U.S. 410 (1993). It decided to prohibit the distribution of commercial handbills, but allowed other publications such as newspapers. The result of the ordinance would have been a removal of 62 newsracks, while about 1,500-2,000 would remain. *Id.* at 418. The Supreme Court agreed with the District Court and the Court of Appeals that the benefit of this restriction was "minute" and "paltry," and therefore, not a proper "fit." *Id.* It held that the city's categorical ban on commercial newsracks placed too much importance on the distinction between commercial and noncommercial speech, and the distinction beared no relation to the particular interests that the city had asserted. *Id.* at 424.

Again, there is no rationality behind the government's distinction between unsolicited advertisements and other unsolicited faxes. The recipient still must bear the cost, and the fax can still interfere with the recipient's use of his or her facsimile machine for business purposes. Unlike the Supreme Court in *Discovery Network*, the Court does not know how many unsolicited faxes an average business receives in one day, nor does the Court know how many of those fall within the TCPA's definition of "advertisement." Therefore, it is difficult for the Court to determine if there is a proper "fit." If the majority of unsolicited faxes fall within the category banned by the TCPA, a proper "fit" might be present. However, the Court questions whether there is a proper fit because of the *increase* in complaints after the TCPA was enacted. It appears that the complaints regarding this problem should have decreased if in fact there was a proper "fit." The Court finds that the government fails to meet its burden of showing that a complete ban on

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(must contain toll-free number in at least 9 pt. type and in same font as body of transmission, and this information must be the first printed material on the faxes).

unsolicited advertisements is not more extensive than necessary to respond to the government's interests.[26]

The government simply fails to meet its burden of demonstrating that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. *See Edenfield*, 507 U.S. at 770. Review of the legislative history reveals no evidence that there is a "serious problem," and the evidence at the hearing only reveals that there is the potential for a serious problem. The government also fails to show that the regulations are no more extensive than is necessary to serve the government's interests. Therefore, the Court holds that 47 U.S.C. § 227(b)(1)(C) is unconstitutional as it violates the First Amendment's guarantee of freedom of speech.

III. Missouri Merchandising Practices Act

The government alleges that defendants violated the Missouri Merchandising Practices Act (MPA) by "misrepresenting, directly or by implication, to Missouri consumers that the fax messages were sent in accordance with federal law, when in fact, sending of unsolicited advertisements via telephone facsimile machine violates 47 U.S.C. § 227." Complaint against American Blast Fax, ¶ 24; Complaint against Fax.com, ¶ 26. The government's argument assumes that defendants violated the provision of TCPA prohibiting unsolicited advertisement faxes. Since the Court has already decided that this provision is unconstitutional, the government's claim pursuant to the MPA must also fail.

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[26] The government argues that the TCPA is not a complete ban because it allows fax advertisements to be sent if the consumer gives express permission. However, there is no practical way for companies to gain permission. They could fax a request form to the consumer asking for permission, and forcing the consumer to fax something back to the company, but that does not seem sensible. Therefore, for all practical purposes the language of the TCPA is a complete ban on facsimile advertising.

Even if § 227(b)(1)(C) was constitutional, the MPA claim against defendants would still be dismissed for failure to state a claim. The MPA prohibits the use of misrepresentation in connection with the advertisement of any merchandise. Mo. Rev. Stat. § 407.020(1). However, the Attorney General does not allege that any of the advertisements faxed by the defendants are false or misleading. In its Response, the Attorney General alleges that defendants by sending fax advertisements, represent that they have permission to send the faxes. Response to Fax.com's Motion to Dismiss, at 19. It argues that this activity is a misrepresentation of fact, just as when an entity purposefully sends a consumer an item the consumer did not order, and then attempts to bill the consumer for the item. The Court finds this analogy unpersuasive. Even if defendants' conduct in sending unsolicited fax advertisements was found to be in violation of the TCPA, the Court fails to see how this conduct is prohibited under the MPA.

Conclusion

Applying the *Central Hudson* standard to the prohibition of unsolicited fax advertisements, the government fails to meet its burden in demonstrating that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree. Furthermore, the government's claim under the MPA was based on the assumption that defendants violated the TCPA. Since the Court finds that the provision prohibiting the sending of unsolicited advertisements is unconstitutional, the MPA claim must also fail.

United States District Court
Eastern District of Missouri
Eastern Division

STATE OF MISSOURI, *ex rel.* JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL,	)	Case No. 4:00CV933 SNL
Plaintiff,	)	
vs.	)	
AMERICAN BLAST FAX, INC., et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on defendant American Blast Fax, Inc.'s motion to dismiss (#9) and defendant Fax.com Inc.'s motion to dismiss.[1] The underlying lawsuit alleges that defendants violated the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, by sending unsolicited facsimile advertisements. Defendants contend that the TCPA violates the First Amendment right of freedom of speech.

The parties are in dispute as to what level of scrutiny should be applied in this case. Fax.com argues that the TCPA's ban on unsolicited fax advertisements is a content-based regulation, and as such must satisfy the strict scrutiny standard of review. The government has no power to restrict expression because of its message, its ideas, its subject

[1] This motion was document #16 in Case No. 4:00cv1265LOD. The cases were consolidated, but the parties were not required to re-file motions already pending in those cases. Therefore, the motion does not have a document number in the current cause of action, Case No. 4:00cv933SNL.

matter, or its content, and with respect to noncommercial speech, the Supreme Court has sustained content-based restrictions only in the most extraordinary circumstances. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65, 103 S. Ct. 2875, 2879 (1983). However, content-based restrictions on commercial speech may be permissible. *Id.* The Court agrees that the restriction at issue is content-based; however, because the speech is commercial[2], the Court must apply the standard which is applicable to commercial speech.

The parties also disagree as to what is the proper standard when evaluating the constitutionality of a law regulating commercial speech. In 1980, the Supreme Court set forth a four-part test that was to be used in analyzing restrictions on commercial speech. *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of NY*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351 (1980). The *Central Hudson* test has been referred to as an "intermediate" level of scrutiny. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623, 115 S. Ct. 2371, 2375-76 (1995). The Attorney General contends that this is still the same standard applicable today. Defendants, however, argue that truthful, non-misleading commercial speech is now entitled to a higher standard of review similar to that imposed for noncommercial speech. They use as support a 1996 Supreme Court plurality decision. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495 (1996). Fax.com admits, as a plurality decision, *44 Liquormart* did not overturn *Central Hudson*, but it argues that the Justices were unanimous in applying a higher standard.[3] However, it is very clear they did not

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[2] Commercial speech is defined as "speech which does no more than propose a commercial transaction." *Bolger*, 463 U.S. at 66, 103 S. Ct. at 2880. Advertisements by definition qualify as commercial speech.

[3] The Court does not fully agree with this assertion. Justice Scalia stated that he shared Justice Thomas's "discomfort with the *Central Hudson* test," but that he was "not disposed to develop new law, or reinforce the old, on this issue." 517 U.S. at 517-18, 116 S.Ct. at 1515 (Scalia, J., concurring in part and concurring in judgment). Justice O'Connor actually did apply the *Central Hudson* test in her opinion, 517 U.S. at 528, 116 S.Ct. at 1520 (O'Connor, J., concurring in the judgment), even

unanimously agree as to what standard should apply. Furthermore, since *44 Liquormart* the Supreme Court has continued to apply the *Central Hudson* analysis in commercial speech cases. *See, Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183-84, 119 S. Ct. 1923, 1930 (1999).

Many judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech. *New Orleans Broad.*, 527 U.S. at 184, 119 S. Ct. at 1930. This change might occur in the near future as evidenced by the multiple opinions in *44 Liquormart*. However, as the law stands today, *Central Hudson* is still the standard which the Court must follow in determining the validity of laws regulating commercial speech.

The *Central Hudson* four-part test is as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of NY, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351 (1980). In this analysis, the Government bears the burden of identifying a substantial interest and justifying the challenged restriction. *New Orleans Broad.*, 527 U.S. at 183, 199 S. Ct. at 1930. It is well established that the party

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though, Justice Thomas implied that she in actuality used a stricter application of *Central Hudson*, 517 U.S. at 524, 116 S. Ct. 1519 (Justice Thomas concurring).

seeking to uphold a restriction on commercial speech carries the burden of justifying it. *Edenfield v. Fane*, 507 U.S. 761, 770, 113 S. Ct. 1792, 1800 (1993). This burden is not satisfied by mere speculation or conjecture; rather, the government must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. *Id.*

There is no evidence before the Court satisfying this burden, because this is a motion to dismiss, and as such the Court can only consider what is in the pleadings. Therefore, the Court will offer the government in opportunity to meet its burden by conducting a hearing on May9, 2001, at 9:00 a.m.

Accordingly,

IT IS HEREBY ORDERED that a hearing will be held **May 9, 2001, at 9:30 a.m.**, to determine if the government can satisfy the four-part analysis as set out in *Central Hudson*.

Dated this 3rd Day of April, 2001.

/s/ Stephen N. Limbaugh
SENIOR UNITED STATES
DISTRICT JUDGE